

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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**Appeal No. 2011AP2434-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2008CF381

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON C. BURTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: LEWIS MURACH and GARY R. SHARPE, Judges. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Aaron C. Burton appeals from a judgment of conviction for burglary and from an order denying his motion for postconviction

relief.¹ Burton contends that the trial court: (1) erred in denying his suppression motion because the warrant authorizing the search of his cell phone was defective and (2) erroneously exercised its sentencing discretion by finding him ineligible for the Challenge Incarceration Program (CIP). Because we conclude that the warrant was supported by probable cause and that the sentencing and postconviction courts properly determined Burton's ineligibility for the CIP, we affirm.

¶2 This case arises from an early morning burglary in Fond du Lac on August 19, 2007, involving the theft of numerous electronics and two delivery trucks from a Silica TV and Appliance warehouse. Later that same day, police located fifteen of the stolen television sets in Milwaukee, at the home of Allen Banks. Banks informed police that Burton, the defendant-appellant, had dropped off the merchandise at his house earlier in the day on August 19, 2007. Under the supervision of law enforcement, Banks placed a call to Burton and they arranged to have Burton come and pick up the television sets from Banks' residence. When Burton arrived, police arrested him and seized the two cell phones in his possession. Police located another of the stolen televisions at Burton's girlfriend's house. Burton was charged with burglary and felony theft.

¶3 Hoping to gain access to the contents of both the white and black cell phones seized from Burton, on August 22, 2007, police applied for and obtained a search warrant for the black phone and subpoenas for the telephone records of both phones. With the assistance of the cell phone company, officers

¹ The Honorable Lewis Murach entered the judgment of conviction. The Honorable Gary R. Sharpe heard and decided Burton's postconviction motion.

retrieved the contacts lists, call information, text messages, and voicemails from both phones.

¶4 Burton filed a motion to suppress, arguing that the search warrant was not supported by probable cause and that the search of the white phone exceeded the warrant's scope. Following a hearing, the trial court concluded that the search warrant was valid and the fruits from the search of the black phone retrieved during the forty-eight-hour period authorized by the warrant were valid. The trial court further concluded that the information retrieved from the white phone was admissible pursuant to the subpoenas.² The trial court ordered suppressed any voicemails retrieved after the forty-eight-hour search period authorized in the warrant.

¶5 Burton pled no contest to one count of burglary, and the felony theft count was dismissed and read in. At sentencing, the court imposed a twelve and one-half year bifurcated sentence, with seven and one-half years of initial confinement and five years of extended supervision. In accordance with the State's recommendation, the trial court did not find Burton eligible for any of the statutory early release programs, including the CIP. In denying access to the CIP, the trial court cited to Burton's lack of documented substance abuse issues and "the information as a whole."

¶6 Burton filed a postconviction motion challenging the trial court's denial of his suppression motion and its determination that he was ineligible for

² The appellant's brief erroneously asserts that the trial court suppressed information retrieved from the white phone. Though the trial court determined that the search of the white phone was outside the scope of the warrant, it concluded that the search was authorized by the signed subpoenas and that information retrieved from the white phone was therefore admissible.

the CIP. With regard to the latter, Burton argued that the sentencing court's ineligibility finding was based on an erroneous belief that the CIP was targeted toward individuals with a history of substance abuse. The postconviction motion requested that the trial court modify his sentence to make Burton eligible for CIP.

¶7 A new judge presided at the postconviction hearing and, after reviewing the record and relevant transcripts, denied Burton's claims. The postconviction court issued a written decision in support of the trial court's order denying suppression. As to Burton's sentencing claim, the postconviction court concluded that the trial court's denial of the CIP was supported by the record at sentencing. The postconviction court acknowledged that the sentencing court "made a reference to the fact that the CIP and the ERP programs are directed to alcohol and drug issues" and agreed that a history of substance abuse was not a prerequisite to the CIP eligibility. Citing the State's recommendation at sentencing, the severity of the crime, and the lack of information linking Burton's intensive supervision needs to the specific programming in the CIP, the postconviction court concluded that Burton's lack of substance abuse was not "the only factor[] at play in [the sentencing court's] decision." The postconviction court stated:

Bottom line, I think, is [the sentencing court] thought this boy was a criminal, he had a poor criminal history, he was headed in the absolutely wrong direction, and he needed to sit his time, and he wasn't interested in seeing him participate in one of these programs

The postconviction court added:

I would not have made this defendant eligible for the CIP program or ERP program, Risk Reduction sentence because my own sense is that the severity of the charge, the criminality displayed by the defendant, the need to protect the public, and to not depreciate the seriousness of this crime and the fact that there was no specific issue raised by

counsel for Mr. Burton ... that could be appropriately addressed by any of these programs, that I am unwilling, at this point, to extend eligibility to him as to those programs as well.

The postconviction court denied Burton's sentence modification motion.

The trial court properly denied Burton's suppression motion because the search warrant was supported by probable cause.

¶8 The search warrant affidavit for the black phone averred that police were investigating an August 19, 2007, 5:30 a.m. burglary in Fond du Lac in which \$140,000 worth of televisions and two delivery trucks were stolen from the Silica warehouse. The affidavit stated that the suspects were located in Milwaukee and that police had discovered several of the stolen televisions in Milwaukee at the home of Allen Banks. The affidavit asserted that Banks told police that he received the televisions from Burton, and that Burton had explained he had "hit a place in a small town." The affidavit averred that detectives had discovered cell phones in Burton's possession and believed that cell phone records would validate Burton's involvement.

¶9 Burton argues that the warrant authorizing the search of his black phone was unsupported by probable cause. He contends that though the affidavit demonstrated probable cause to believe that Burton was involved in the burglary, it failed to support an inference that the cell phones located in Burton's possession were used or involved in the burglary.

¶10 A search warrant may issue only upon a finding of probable cause by a neutral and detached magistrate. *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). "Probable cause for a search warrant is not a technical or legalistic concept, but rather, is a 'flexible, common-sense measure of

the plausibility of particular conclusions about human behavior.’” *State v. Herrmann*, 2000 WI App 38, ¶22, 233 Wis. 2d 135, 608 N.W.2d 406 (citation omitted). Elaborate specificity is not required, and probable cause may be supported by reasonable inferences as well as facts. *State v. Sloan*, 2007 WI App 146, ¶24, 303 Wis. 2d 438, 736 N.W.2d 189.

¶11 On review, we are confined to the record that was before the warrant-issuing judge and we accord great deference to the magistrate’s determination of probable cause. *Id.*, ¶8. We will uphold the decision to issue a warrant unless the facts in the supporting affidavit “were clearly insufficient to support a finding of probable cause.” *Id.* (citation omitted). Doubtful or marginal cases will be resolved in favor of the warrant. *Higginbotham*, 162 Wis. 2d at 990.

¶12 We conclude that the facts contained in the warrant application and the reasonable inferences therefrom support a finding of probable cause. As Burton himself acknowledges, through Banks’ possession of the televisions and his statements to police, the affidavit establishes probable cause to believe that Burton was involved in the Silica burglary.

¶13 The affidavit also establishes a sufficient nexus between the burglary for which Burton was under investigation and the cell phones found in his possession. The affidavit asserted a large-scale burglary involving the theft of over \$140,000 worth of television sets and two delivery trucks. It is reasonable to infer that multiple people were involved in the operation, especially given the asportation of two trucks, and that the operation involved planning and cross-county travel. It is reasonable to assume that the multiple actors used cell phones to communicate and coordinate the complex heist. Further, the affidavit establishes that Burton transported multiple large items from the “small town” to

Banks' home, and it is reasonable to infer that Burton was continuing to use the phones to coordinate the storage and disposal of the property even after the burglary. The phones were found in Burton's possession soon after the burglary and this further connects these particular phones to the burglary's commission. Finally, given that the phones were in Burton's possession shortly after the burglary, and given the ability to track a person's travel and location through cell phone records and GPS triangulation, it is reasonable to infer that seizure and inspection of the phones would lead to further evidence corroborating Burton's involvement.

¶14 We note that ideally the officers could have included additional known details in the affidavit, such as the fact that Burton transported the merchandise to Banks' Milwaukee residence the same day as the burglary, and that Burton communicated by phone with Banks both in order to arrange the drop off of the stolen merchandise and again while en route back to Banks' home to retrieve the merchandise. Regardless, the affidavit as it existed provided probable cause for the search warrant.

Both the sentencing and the postconviction courts properly exercised their discretion in determining that Burton was ineligible for the Challenge Incarceration Program.

¶15 Burton maintains the trial court erroneously exercised its sentencing discretion because it found him ineligible for the CIP based on a mistaken belief that the CIP is designed to address substance abuse problems. We disagree.

¶16 In imposing sentence, the trial court must consider the gravity of the offense, the offender's character, and the public's need for protection. *State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). These same sentencing

factors are considered by the trial court in determining program eligibility. *See State v. Owens*, 2006 WI App 75, ¶¶9-11, 291 Wis. 2d 229, 713 N.W.2d 187. The trial court need not make separate findings to justify its determination of a defendant's program eligibility "so long as the overall sentencing rationale also justifies" its eligibility decision. *Id.*, ¶9. Review of a sentencing decision is limited to determining whether there was an erroneous exercise of discretion. *State v. Harris*, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409.

¶17 At Burton's postconviction hearing, the court acknowledged that the sentencing court considered Burton's lack of drug and alcohol treatment needs in determining the CIP eligibility. The postconviction court nonetheless concluded that the sentencing transcript reflected the trial court's "overall assessment of the factors that a court must take into consideration in sentencing including and principal among them, the gravity of the crime." We agree.

¶18 At sentencing, the trial court considered at length the seriousness of the offense, Burton's character, and the need to protect the public. The trial court found that the offense was "extra ordinarily (sic) serious" and described it as the "biggest heist this small town has seen." The trial court contemplated the degree of planning and coordination necessary to commit such a large-scale burglary. In accordance with the State's recommendation, the trial court declined to find Burton eligible for any of the prison's early release programs "based on the information as a whole." The record demonstrates that in denying eligibility, the trial court emphasized the seriousness of the offense, a proper factor on which to base an eligibility determination. *State v. Steele*, 2001 WI App 160, ¶11, 246 Wis. 2d 744, 632 N.W.2d 112 (the trial court's decision to deny program eligibility based on the severity of the offense was an appropriate exercise of discretion).

¶19 Burton additionally argues that the postconviction court erroneously denied his sentence modification motion seeking the CIP eligibility. Burton contends that the postconviction court placed too much weight on the aggravating factors weighing against the CIP and failed to explain how the CIP ineligibility would promote the sentencing objectives or why a waiting period rather than outright denial would not suffice. We disagree.

¶20 The weight to be given each sentencing factor is within the trial court's sound discretion. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court is not required to detail or "to separately explain its rationale for each and every facet of the sentence imposed." *State v. Matke*, 2005 WI App 4, ¶19, 278 Wis. 2d 403, 692 N.W.2d 265. Here, the postconviction court properly exercised its discretion in determining that the CIP was inappropriate given "the severity of the charge, the criminality displayed by the defendant, [and] the need to protect the public."

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

